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## NOTES

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### PRIVILEGE OF CRIMINAL DEFENDANT AND SCOPE OF CROSS-EXAMINATION

"A criminal defendant who takes the witness stand to testify on his own behalf is subject to cross-examination under the same rules which apply to ordinary witnesses." This statement, with minor verbal variations, has been accepted as a statutory codification of the rules governing cross-examination of criminal defendants.<sup>1</sup> And the same formulation has been adopted by decision in a considerable number of jurisdictions.<sup>2</sup>

More elements than appear in the phrasing are included in this condensed statement. Two aspects must be considered in determining the relation between the rules governing cross-examination of an ordinary witness and a criminal defendant: (1) the scope of permissible cross-examination, and (2) waiver of the constitutional privilege against self-incrimination. Neither aspect is mentioned but presumably both are included, and the criminal defendant is put in a position identical on both points with that of an ordinary witness. That, at least, is

<sup>1</sup> For example, see Nev. Comp. L. 1929, § 11253; N. Car. Code 1935, § 1799; Fla. Comp. Gen. L. 1927, § 8385; Remington's Wash. Rev. Stat. 1932, § 2148; Haw. Rev. L. 1935, § 3824.

<sup>2</sup> See *Chambers v. People*, 105 Ill. 409, 413 (1883); *People v. Dupounce*, 133 Mich. 1, 94 N.W. 388 (1903); *Smith v. State*, 137 Ala. 22, 34 So. 396 (1903).

a result commonly reached.<sup>3</sup> Yet, the frequency with which the rationale supporting the former of these aspects seems to control in the determination of a case involving the latter indicates the pitfalls that are created by a combination of both in a single statement.<sup>4</sup> It shows that the application of the statement is not always consciously reasoned but may often be the result of incomplete or confused analysis.

With respect to the scope of cross-examination, the position of a criminal defendant and that of an ordinary witness have generally been held identical.<sup>5</sup> On the other hand, the criminal defendant can refuse to take the stand; an ordinary witness cannot.<sup>6</sup> For this reason, where an ordinary witness takes the stand under the coercion of a subpoena he is generally held to waive his privilege

<sup>3</sup> See *Chambers v. People*, 105 Ill. 409, 413 (1883) where the court said, "Such a person [a criminal defendant] when introduced as a witness, moreover, is to be examined and cross-examined precisely as other witnesses. . . ." See also *Quintano v. State*, 29 Tex. App. 401, 406, 16 S.W. 258, 260 (1891). "It will be seen, then, that when a defendant assumes the role and character of the witness, he is subject to *all* the tests and rules applicable to other witnesses, even to the answering of questions which would criminate him." (Italics added.)

<sup>4</sup> See *State v. Larkens*, 5 Idaho 200, 47 Pac. 945 (1897). The court relied upon the scope of cross-examination rule set up in Idaho Rev. Stat. 1887, § 6079, in defining the extent of waiver.

In *Guy v. State*, 90 Md. 29, 44 Atl. 997 (1899), the court cited 8 Encyc. Pl. & Proc. 147, which states that a defendant, by appearing on the stand "waives his privilege of refusing to give evidence against himself as to all matters within the proper scope of cross-examination," as the rule prevailing in many states. This rule in Maryland would have confined the evidence of the accused to matters pertinent to the testimony in chief, for that was the accepted scope rule, *Herrick v. Swomley*, 56 Md. 439, 455 (1881); and a previous case had actually held the privilege waived to that extent. *Roddy v. Finnegan*, 43 Md. 490 (1825). The court, however, did not follow that rule but adopted one under which privilege is waived as to all matters relevant to the issues of the case. In doing so, the court did not separate the principle of waiver from that of scope of cross-examination. It is likely that the court still clung to the theory that the waiver should be determined by the scope rule, for several years later it showed its dissatisfaction with the Maryland scope rule by allowing the discretion of the trial court to temper the rule. *Black v. First Nat'l Bank*, 96 Md. 399, 54 Atl. 88 (1903). Thus the *Guy* case probably shows merely a new view of scope rather than a different waiver principle.

<sup>5</sup> Notes 3 and 4 *supra*; *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695 (1885); *Disque v. State*, 49 N.J.L. 249, 8 Atl. 281 (1887); *People v. Webster*, 139 N.Y. 73, 84, 34 N.E. 730, 736 (1893). But see *Rea v. Missouri*, 17 Wall. (U.S.) 532, 542 (1873), "a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses." Here the interplay of waiver and scope is again apparent. In contrast, the rule is sometimes more strictly applied in favor of the criminal defendant. *State v. Lurch*, 12 Ore. 99, 6 Pac. 408 (1885).

In Missouri different rules were set up by statute. *State v. Turner*, 76 Mo. 350 (1882). The scope of cross-examination is defined to extend to the entire case, except where a defendant in a criminal case testifies in his own behalf. Mo. Rev. Stat. 1929, § 1727. Mo. Rev. Stat. 1899, § 2637 defined the limit of permissible cross-examination of an accused as reaching only to matters relevant to the testimony in chief. This section has been repealed. Mo. L. 1921, p. 392.

<sup>6</sup> *Bolling v. United States*, 18 F.(2d) 863, 865 (1927); 4 Wigmore Evidence §§ 2260, 2268, 2276 (2d ed. 1923).

against self-incrimination only as to matters testified to on direct examination.<sup>7</sup> He must fill out the story which he gave on direct examination but he need not answer questions with regard to other incriminating facts, even though they be relevant to the issue.<sup>8</sup> On the other hand, where the criminal defendant takes the stand a broader rule on waiver of the privilege against self-incrimination should be invoked. He has taken the stand voluntarily and should not be heard to complain about any questions relevant to the crime in issue whether or not pertinent to the matter brought out on direct. Thus under most theories governing the extent of the waiver by a criminal defendant, that waiver will not become identical with either the rule on extent of the waiver by an ordinary witness, nor with the rule on scope of permissible cross-examination of the ordinary witness. Under some interpretations of the statutory formula, however, the extent of waiver by the criminal defendant is determined by the rule governing scope of cross-examination of ordinary witnesses without regard for the rationale behind waiver.<sup>9</sup> Each of these two doctrines possesses a separate origin, development, and rationale.<sup>10</sup> Several theories determining the extent of each have been accepted.<sup>11</sup> It is only by a coincidence of one of the theories concerning the scope of cross-examination with a particular one of those concerning waiver that both considerations can be given effect under an application of the statutory rule. When this coincidence is lacking no result can be obtained which is consistent with the rationale behind each principle.

The rules governing the scope of cross-examination affect primarily the *order* of proof. A fact is not prevented from being proved merely because it is outside the scope of permissible cross-examination. If, for this reason, it cannot be shown on cross-examination, the proponent of that fact can call the witness as his own to prove it on examination in chief.<sup>12</sup> The privilege against self-incrimination, on the other hand, absolutely prevents the presentation of evidence which comes within its pale.<sup>13</sup> When, therefore, an item of evidence is outside the scope of cross-examination but would not be excluded by virtue of the

<sup>7</sup> *Graul v. United States*, 47 D.C. App. 543, 549 (1918); *Lockett v. State*, 63 Ala. 5, 11 (1879); 4 Wigmore, *op. cit. supra* note 6 § 2276.

<sup>8</sup> Note 7 *supra*.

<sup>9</sup> Note 4 *supra*.

<sup>10</sup> 4 Wigmore, *op. cit. supra* note 6, §§ 2250-52, 2276; 3 Wigmore, *op. cit. supra* note 6, §§ 1885-90.

<sup>11</sup> 4 Wigmore, *op. cit. supra* note 6, §§ 2276-77; 3 Wigmore, *op. cit. supra* note 6, §§ 1869, 1886-90.

<sup>12</sup> 3 Wigmore, *op. cit. supra* note 6, § 1869; 4 Wigmore *op. cit. supra* note 6, § 2278.

By calling an opposing witness as his own a party impairs his right of impeachment, which, in a criminal case, may be so important that often the prosecution cannot afford to make the defendant its own witness by exceeding the scope of permissible cross-examination. In this situation evidence will as a practical matter be excluded if it is outside the scope of cross-examination. See Ladd, *Impeachment of One's Own Witness—New Developments*, 4 Univ. Chi. L. Rev. 69 (1936); 2 Wigmore, *op. cit. supra* note 6 § 896 *et seq.*

<sup>13</sup> 4 Wigmore, *op. cit. supra* note 6, § 2268.

privilege theory alone, its presentation will be absolutely prevented if the rule governing waiver of the privilege is defined by the rule governing the scope of cross-examination, though the latter rule was designed only to postpone the presentation of the evidence. Conversely, when an item of evidence is within the scope of cross-examination but would be excluded by the privilege, an application of the rule governing the scope of cross-examination would allow the admission of evidence in direct derogation of the considerations upon which the rule for waiver of the privilege is founded.

A contrast of each of the various views which have been accepted upon the waiver of the privilege with each of those dealing with the scope of cross-examination will show the effect of settling the two problems under a single rule. Practically every possible combination of each view on one principle with every one on the other principle has been accepted in some jurisdiction.

The most narrow waiver rule states that the privilege can be asserted at any time.<sup>14</sup> This is virtually a denial of the proposition that there can be any waiver at all. No possible rule on the scope of cross-examination could be more narrow than this. Consequently, the application of any of the various rules governing the scope of cross-examination would deprive the accused of his privilege to some extent by requiring him to answer questions to which, under this waiver rule, he could refuse a reply. Stating waiver in terms of any of these scope rules will therefore violate the rationale which warranted the acceptance of this rule governing waiver.

The accused's appearance has been said to waive his privilege against self-incrimination to any matters relevant to the crime with which he is charged.<sup>15</sup> The Federal scope of cross-examination rule, in contrast, limits the cross-examination to matters concerning the evidence brought out on the examination in chief.<sup>16</sup> A determination of the former rule by the latter would cause no change in some cases, while in others it would be narrower or wider depending

<sup>14</sup> 4 Wigmore, *op. cit. supra* note 6, § 2276.

The apparent advocacy of this view by Judge Cooley in *Constitutional Limitations* (2d ed. 1871), at page 317, drew adverse criticism from several courts. In a later edition (3d ed. 1873) Judge Cooley effectually repudiated this view by an explanation of his earlier statement.

In Georgia a criminal defendant has not been made competent to become a witness at his trial. He may make a statement in his defense, but it is not under oath. The statute provides, "The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer." Ga. Code 1933, § 38-415. See *Hackney v. State*, 101 Ga. 512, 28 S.E. 1007 (1897); *Walker v. State*, 116 Ga. 537, 42 S.E. 787 (1902).

<sup>15</sup> See note 4 *supra*; *Bolling v. United States*, 18 F.(2d) 863 (C.C.A. 4th 1927); *State v. Thornton*, 174 Minn. 323, 219 N.W. 176 (1928); 4 Wigmore, *op. cit. supra* note 6, § 2276.

<sup>16</sup> *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U.S.) 448, 461 (1840); 3 Wigmore, *op. cit. supra* note 6, § 1885 *et seq.*

This rule is modified in practice because the trial judge is usually given wide discretion. *Black v. First Nat'l. Bank*, 96 Md. 399, 54 Atl. 88 (1903); *Bolling v. United States*, 18 F. (2d) 863 (C.C.A. 4th 1927); *McBride v. United States*, 101 Fed. 821 (C.C.A. 8th 1900). See *Rea v. Missouri*, 17 Wall. (U.S.) 532, 542 (1873) note 5 *supra*.

upon the facts involved. When, for instance, the direct examination covers all relevant issues, each rule would allow and exclude the same evidence. That happy state of affairs is the result of fortuitous combination of facts. In the case of a crime involving wholly separate elements,<sup>17</sup> the accused's testimony on one element alone would, under the Federal rule, confine cross-examination to the clarification of any half-truths and the filling-in of details. The other elements of the crime would be outside the scope of cross-examination. To make the scope rule determine the extent of waiver would be to exclude the evidence, even though the waiver rationale would not lead to that result. If the direct examination should cover more than the crime charged, the rationale of the waiver principle would be ignored, under the rules applying to an ordinary witness, because the scope of cross-examination would cover more evidence than that upon which the privilege was waived. The Connecticut rule on scope of cross-examination is more liberal than the Federal rule; it allows the cross-examiner to bring out relevant matter not mentioned on the direct examination so long as he does not present his affirmative case.<sup>18</sup> Similarly to the problem under the Federal rule, each situation can determine whether the scope of cross-examination will be wider or narrower than the extent to which the privilege is waived. Insofar as matters connected with the crime charged and not covered in the direct examination do not tend to refute the case of the accused,<sup>19</sup> they will be a part of the prosecution's affirmative case and therefore outside the scope of cross-examination. Consequently, the waiver theory stated in terms of this narrower scope rule will exclude the evidence rather than merely postpone it, despite the fact that postponement until the direct examination of the prosecution would be the proper result if the theories were separately considered. When the scope is wider than the waiver rule, the same undesirable effect which was seen under the Federal rule will result from their fusing, for the situations in which that problem arises are identical with those arising under the application of the Federal rule. The rule on scope of cross-examination that was universally accepted before the advent of the Federal rule allows inquiry on all matters relevant to the issues of the case.<sup>20</sup> It is obvious that evidence upon

<sup>17</sup> For example, proof of criminal intent by similar collateral crimes.

<sup>18</sup> Professor Wigmore calls this the Michigan rule. 3 Wigmore, *op. cit. supra* note 6, § 1889. It was set up in *Campau v. Dewey*, 9 Mich. 381, 419 (1861). This rule seems to have been changed in Michigan, however, by the case of *Waller v. Sloan*, 225 Mich. 600, 196 N.W. 347 (1923), where the court said that it does not offend justice for a plaintiff to "make out his case from the cross-examination of the defendant." Connecticut still follows the old Michigan rule. *Finch v. Weiner*, 109 Conn. 616, 145 Atl. 31 (1929). See also *Legg v. Drake*, 1 Ohio St. 286, 290 (1853).

<sup>19</sup> For instance, when the defendant's testimony establishes an alibi and the attempted cross-examination concerns a preparatory crime.

<sup>20</sup> *Webster v. Lee*, 5 Mass. 334 (1809); *Waller v. Sloan*, 225 Mich. 600 196 N.W. 347 (1923). See also *Fulton Bank v. Stafford*, 2 Wend. (N.Y.) 483, 485 (1829). This latter case has, of course, been overruled by *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U.S.) 448 (1840).

Professor Wigmore calls this the "orthodox" rule. 3 Wigmore, *op. cit. supra* note 6, § 1885.

which the privilege is not waived could be within this scope of cross-examination. It is not possible, however, for the waiver to be more extensive than this scope, for the crime charged must be relevant to the issues of the case. Consequently, governing the extent of waiver by this rule of cross-examination would be subject only to the criticisms which are appropriate when the rationale of the waiver rule is submerged.

Another accepted rule for the waiver of the privilege is phrased identically with the Federal rule governing scope of cross-examination: the waiver extends only to matters dealt with on direct examination.<sup>21</sup> Upon the opportune concurrence of these two theories, both principles can be given fair treatment when governed by the same phrase. Under the other scope rules, however, cross-examination is not limited to matters presented in chief. Use of those rules to govern the extent of waiver is open to criticism, for the rationale of this waiver theory would be ignored.

Numerous courts have stated, in cases where waiver of the privilege against self-incrimination was involved, that the criminal defendant is subject to cross-examination under the same rules which apply to an ordinary witness.<sup>22</sup> This is the counterpart of the statutory phrasing under discussion. If those courts arrived at that theory of waiver on the grounds which are appropriate to an analysis of waiver, not scope of cross-examination, their position is defensible. If, however, that rule was obtained by an unconscious substitution of the scope of cross-examination rule or by confusion of the two rationales, all of the criticisms here made are applicable.

The English statutory rule confines waiver to the crime charged but does not prevent the privilege from barring evidence of collateral criminal acts, even though relevant to the crime in issue.<sup>23</sup> The effect of the Federal scope rule will be wider than this waiver rule in cases in which the direct examination does not cover the whole of the crime charged. On the other hand, the Federal scope rule may be narrower, for the direct examination might go beyond the crime charged. This latter case, however, is not likely to arise.<sup>24</sup> Most often the direct examination will cover the whole crime charged and nothing more, and in that case the English rule of waiver and the Federal scope rule will be co-ex-

<sup>21</sup> State v. Sprague, 64 N.J.L. 19, 45 Atl. 788 (1900); 4 Wigmore, *op. cit. supra* note 6, § 2276.

<sup>22</sup> Whether this statement is meant to cover waiver, scope, or both is usually not clear. The statement, however, is frequently repeated. See cases cited in note 2 *supra*.

<sup>23</sup> 61 & 62 Vict., c. 36 § 1 (e) and (f) (1898).

In Maine a statute provides that the defendant in a criminal prosecution who testifies in his own behalf "shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him, of any other crime than that for which he is on trial." Me. Rev. Stat. 1930, c. 146, § 19. This would seem to achieve the same result as the English statute, but it has been held not to exclude evidence of independent crimes which are relevant and material to the main questions in issue. State v. Witham, 72 Me. 531, 535 (1881).

<sup>24</sup> The accused will obviously confine his testimony to limits as narrow as possible for the very purpose of limiting the waiver.

tensive. When collateral crimes, within the privilege under the English rule, are relevant to the issues, the other scope rules will be wider than this rule of waiver. To permit the prosecution to bring out collateral crimes on cross-examination, in conformity with these scope rules, would be in violation of the English rule of waiver.

An extreme rule states that the accused waives his privilege entirely by his appearance on the witness stand and that questions about collateral criminal acts can be asked for the sole purpose of impeachment.<sup>25</sup> All scope rules concur in allowing impeachment upon cross-examination.<sup>26</sup> The separate rules governing ordinary impeachment are added to the two sets of rules already discussed and may temper the effect of this rule by an influence upon the interpretation of the formula. For example, the New York rule against impeachment by degrading questions<sup>27</sup> may well operate to exclude evidence otherwise admissible under the extreme waiver rule. Yet the ever present danger that the rules governing impeachment may be submerged in the application of the statutory formula may make the appearance of the criminal defendant on the stand in his own behalf too dangerous to be risked. Impeachment by independent criminal acts is apt to result in conviction of the defendant as a tax evader for murder.

The English statutory rule of waiver should obtain the most desirable result, for it will exclude the danger of conviction upon collateral matters and yet require waiver wide enough to make possible the disclosure of half-truths by cross-examination.<sup>28</sup> That this rule is not co-extensive with any scope rule in every set of facts has already been shown. A satisfactory disposition of the problem can only be reached, however, if the courts keep in mind that the doctrine of waiver is entirely separate from that of scope and that a forced connection of the two leads only to ambiguity.

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#### DISTRIBUTION OF THE PROCEEDS FROM A DELAYED SALE OF UNPRODUCTIVE TRUST INVESTMENTS—NEW FORMULAS FOR OLD

When property settled in trust for successive beneficiaries is or becomes wholly or partly unproductive, and there is a sale only after a reasonable delay, the trustee is faced with the problem of equitably distributing the sale proceeds.

<sup>25</sup> *State v. Griffin*, 201 N. Car. 541, 160 S.E. 826 (1931); *People v. Webster*, 139 N.Y. 73, 84 (1893). The general view seems to be that there is no waiver of the privilege in regard to independent crimes when they are used merely for impeachment purposes. *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1895); *State v. Banks*, 258 Mo. 479, 167 S.W. 505 (1914). *Cf. State v. Pancoast*, 5 N.D. 516, 551, 67 N.W. 1052, 1062 (1896).

<sup>26</sup> 2 Wigmore *op. cit. supra* note 6 § 914.

<sup>27</sup> *Lohman v. People*, 1 N.Y. 379 (1848). This rule remains only in a few jurisdictions. 2 Wigmore *op. cit. supra* note 6 § 914. *Cf. State v. Rozum*, 8 N.D. 548, 80 N.W. 477 (1899), where the court held that degrading questions would be allowed.

<sup>28</sup> It is true that the English rule prevents the showing of preparatory crimes on cross-examination, but these crimes, since relevant to the issues of the case, may be proved by independent witnesses. See 4 Wigmore, *op. cit. supra* note 6, § 2277.